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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 424

THOMAS P. SPRUNT, *Petitioner,*

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

THOMAS P. SPRUNT, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Utah entered in the above-entitled case on the 8th day of June, 1959.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah is unprinted in the official Utah Reports. It is found in 340 P. 2d 85, and is printed in Appendix "A" hereto, infra, page 1a.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on the 8th day of June, 1959. Rehearing was denied on the 26th day of June, 1959 (infra, Appendix "A", page 5a). The jurisdiction of the Court is invoked under Title 28, U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

1. May the identical facts which formerly constituted the defense in law of assumption of risk be used as the basis for the partial defense of contributory negligence under the provisions of the Federal Employers' Liability Act notwithstanding the provisions of Title 45, U.S.C.A., Section 54?

2. The petitioner, a railway switchman, knew there were numerous holes and rough spots along a roadbed where he was required to work, but at the time of his accident they were covered by snow and he did not know their exact locations. He suffered a 50 per cent partial permanent loss of use of his left arm as a result of slipping in a snow-covered hole. These facts formerly would have constituted the defense of assumption of risk, which was "entirely obliterated" by the 1939 amendment of the FELA. May these same facts now be used as the basis for the partial defense of contributory negligence?

STATUTES INVOLVED

The statutes applied by the Supreme Court of the State of Utah are:

45 U.S.C.A., Section 51
45 U.S.C.A., Section 53
45 U.S.C.A., Section 54

The pertinent texts of these sections are set forth in Appendix "A", pages 5a, 6a and 7a.

STATEMENT

The petitioner was employed by the respondent as a switchman (R. 40). He had been so employed for thirty-two (32) years (R. 39). On the date of injury, January 4, 1957, the appellant was working as a foreman of a switch crew of the respondent in the yards of the Vitro Chemical Company (R. 39-40). The terrain adjacent to the track where the switch crews walked and worked was rough and pockmarked with holes caused by a clam shell machine (R. 22, 23, 40, 49, 105). This condition had prevailed for a period of six (6) months to the petitioner's knowledge (R. 49). Complaints had been made to the respondent through the Switchmen's Union of North America, of which the petitioner, was a member on at least two occasions prior to the accident. However, nothing was done by the respondent to rectify the unsafe condition of the roadbed (R. 104, 112, 113, 114).

Immediately prior to the injury, appellant had been checking car numbers (R. 41). As the cut of cars upon which he was working commenced to move, it became necessary by reason of a curve for petitioner to mount a side of the car to "go high," meaning to climb on top of the car to pass signals (R. 42). He pro-

ceeded to board the car in the usual, customary manner employed by switchmen, when his foot slipped into a snow-covered hole, some eight to ten inches deep, causing him to fall (R. 42, 43). The rotor cuff muscle in his left arm was damaged (R. 69, 70) and he suffered a permanent loss of use of the left arm estimated to be fifty per cent (50%), which rendered his continued employment by respondent impossible (R. 69, 70). Although the appellant and other members of the switch crew were cognizant of the fact that there were numerous holes and rough spots along the roadbed, none of them could locate the holes on that particular day by reason of the fact that it had snowed previously and the wind had blown the snow so as to cover the ground and fill the holes (R. 22, 49). The appellant could not see and did not know of the hole which caused his fall until after the accident (R. 49).

The trial court submitted the issue of contributory negligence to the jury although petitioner objected on the ground that only the barred issue of assumption of risk was available under the facts. The jury returned a verdict of $15,000.00 but reduced the award to $5,000.00 by reason of petitioner's alleged contributory negligence.

Petitioner renewed his objections in a motion for judgment notwithstanding the verdict or for a new trial, before the Supreme Court of Utah on appeal, and upon petition for rehearing. All his efforts were unavailing. As a result, petitioner is not only unable to pursue his former employment but he has been deprived of $10,000.00 to his further damage.

REASONS FOR GRANTING THIS WRIT

The decision of the Utah Court:

1. Nullifies the 1939 amendment which "entirely obliterated" the defense of assumption of risk;

2. Is in direct conflict with all of the decisions of this court construing that amendment;

3. Is in conflict with all of the decisions of the Circuit Courts of Appeal, which, without exception, identify facts of this character as assumption of risk; and

4. Is in conflict with applicable state court decisions, which differentiate between assumption of risk and contributory negligence, and hold that facts such as those in this case are encompassed in the doctrine of assumption of risk.

The railroads of America for a period of fifty (50) years skillfully and effectively engrafted onto the Federal Employers' Liability Act the doctrine of assumption of risk. In: *Pryor* v. *Williams*, 254 U.S. 42, 65 L. Ed. 120; *D. L. & W. R. Co.* v. *Koske*, 279 U.S. 17, 73 L. Ed. 578; and *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U.S. 43, 51 L. Ed. 681; they convinced the Supreme Court of the United States that the facts in that case constituted the defense of assumption of risk and not contributory negligence.

The railroads succeeded so well that in 1939, the Congress of the United States amended the Federal Employers' Liability Act by adding 45 U.S.C.A., Section 54. In so doing, the Congress held that, as a matter of public policy and law, the doctrine of assumption of risks and the facts upon which the defense was based were no longer available to the railroads and to this respondent.

The Supreme Court of the United States in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L. Ed. 610, held that "every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment." It further held that "an employee could not be charged with contributory negligence simply because he assumed the risk."

The railroads rose to the attack. They first attempted to defeat the 1939 amendment and the law of *Tiller* v. *Atlantic Coast Line Railroad Co., supra*, by contending that the facts which they had contended previously constituted assumption of risk were really not assumption of risk at all but, on the contrary, constituted proof of non-negligence. This attack on the law was repulsed by the following decisions:

Anderson v. *Elgin, Joliet and Eastern Railway Co.*, 7th Cir., Ill., 227 F. 2d 91
Johnson v. *Erie Railroad Co., N. Y.*, 236 F. 2d 352
Southern Railway Co. v. *Welch, Tenn.*, 6th Cir., 247 F. 2d 340
Texas and Pacific Railway Co. v. *Buckles*, 232 F. 2d 257
Williams v. *Atlantic Coast Line R. Co.*, 190 F. 2d 744

As a result, the railroads have changed their tack. Now, they are attempting to emasculate the 1939 amendment and render its intended aid and relief a nullity by completely reversing fifty (50) years of earnest contention. Here in the first reported decision of its kind, the carrier maintains in effect that the facts which it claimed for fifty (50) years constituted assumption of risk is not assumption of risk at all — that they were wrong all the while and that these facts really constitute contributory negligence. If the deci-

sion of the Supreme Court of Utah is upheld, it is foreseeable that the railroads will succeed in defeating some claimant's rights by convincing a jury that the claimant's injuries were caused solely by his negligence. The proof of said claimant's negligence will be based upon facts which formerly constituted assumption of risk. If this appears far-fetched, consider that, in this case, the respondent succeeded in nullifying $10,000.00 out of a $15,000.00 verdict.

However, the Supreme Court of the State of Utah decided this case contrary to the express pronouncements of the following decisions in the Supreme Court of the United States:

Schlemmer v. *Buffalo, R. & P. R. Co.*, 205 U.S. 43, 51 L. Ed. 681;
Pryor v. *Williams*, 254 U.S. 42, 65 L. ed. 120;
D. L. & W. R. Co. v. *Koske*, 279 U.S. 7, 73 L. ed. 578;
Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U.S. 54, 87 L. ed. 610.

The Supreme Court of the State of Utah further ignored the following case from the United States Circuit Court of Appeals:

Thomas v. *Union Railway Co.*, 6th Cir., 216 F. 2d 18.

The facts as set forth above and which are uncontroverted by any testimony on the part of the respondent demonstrate a classic example of those facts which have always been judicially determined to constitute assumption of risk. If it be claimed that in some way the appellant was derelict in failing to do some act or acts, it has been found under the law as set forth in the cases above that such act or acts are so close to and

commingled with the facts creating the doctrine of assumption of risk as to be a part thereof.

The sole question therefore is whether the Supreme Court of the State of Utah, in finding that these facts could support a finding of contributory negligence, erred.

The problem as to what constitutes assumption of risk, which is outlawed by statute, and what constitutes contributory negligence on the part of an employee, is a difficult, close question. An examination of the law prior to 1939 and the law subsequent to 1939 discloses a very interesting fact, namely, that the facts in issue here have always been held to be facts constituting the defense of assumption of risk.

Thus, in *Kansas City Railroad Co.* v. *Roe*, Okla. 1919, 180 P. 371, the Court held that a switchman having knowledge of the rough and uneven condition of a track assumed the risk of the derailment which was caused by the defective condition of the roadbed.

In *Edwards* v. *Southern Railroad Co.*, Ga. 184 S.E. 370, the Court held as a matter of law that an experienced switchman assumed the risk of injury from soft uneven dirt and gravel alongside the track; that he also assumed the risk of broken, rotten and uneven cross ties at a place where a switchman attempted to mount an engine.

It will be observed that the facts in the cases are almost precisely the facts involved in the case at bar.

In *Lehi Valley Railroad Co.* v. *Hatmaker, Pa.*, 69 F. 2d 282, a railroad switchman who slipped and fell injuring his knee while closing a switch was held not to be entitled to recovery because he assumed the risk of

injury from frost, grease and dirt on the ties by reason of the fact that he had knowledge thereof, and in addition he had knowledge of the defective condition of the ground below the ties.

These views were finally and conclusively established by the Supreme Court of the United States in *Delaware L. & W. RR Co.*, v. *Koske*, *supra*. The petitioner sued in the Circuit Court of Hudson County, New Jersey, to recover damages sustained by him when, in the dark and while alighting from an engine in the course of his employment, he stepped or fell into an open ditch. The conditions relative to the ditch had been constant and of long duration. The plaintiff had known of the location of the ditch and its condition at the place in question.

Justice Butler speaking for the Supreme Court stated on page 581:

> "* * * And, except as provided in § 4 of the act, the employee assumes the ordinary risks of his employment; and when obvious, or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees. Seaboard Air Line R. Co. v. Horton, 233 U.S. 492, 501, 58 L. ed. 1062, 1068, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N.C.C.A. 834; St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 70 L. ed. 979, 46 Sup. Ct. Rep. 520; Northern R. Co. v. Page, 274 U.S. 65, 75, 71 L. ed. 929, 933, 47 Sup. Ct. Rep. 491."

Justice Butler in reversing the judgment of the jury for the plaintiff concluded by saying at page 582:

> "* * * He worked in daylight for some time every morning during the spring and summer

> months, and during one year he worked days. There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.
>
> "It was the duty of the judge presiding at the trial to direct the jury to return a verdict in favor of the defendant."

In all of these cases, the question was not that of the negligence of an employee which would only mitigate damages, but that of an absolute defense to any damages on the basis of the employee's assumption of risk, and uniformly under the facts at bar, as the preceding cases show, the defense was found to be a valid defense as a matter of law.

The Supreme Court had a similar problem in *Pryor v. Williams, supra*. While in the course of his duties as a railroad employee, Williams was instructed to tear down a bridge on the line of the railroad, and while so engaged a defective claw bar which he was directed to use caused the bar to slip while he was attempting to draw a bolt. By reason of the slip, Williams lost his balance, fell to the ground, a distance of twelve (12) feet, and received the injuries which were the subject of that action. By way of defense, the carrier charged contributory negligence and assumption of risk.

The trial court found that the claw bar was defective in that the claws had become so rounded and dull

that they could not be made to grab the shank securely, and that this defect was so obvious that the most cursory and superficial examination would have disclosed it to the plaintiff. The trial court held that this was contributory negligence, not assumption of risk. The Court of Appeals reversed, holding that it was assumption of risk and not contributory negligence. The Supreme Court of Missouri sustained the trial court and the case went to the Supreme Court of the United States on certiorari.

Justice McKenna speaking for the Supreme Court, in citing a substantial number of cases, reversed the Supreme Court of Missouri, sustained the Missouri Court of Appeals and held that these facts constituted the defense of assumption of risk as a matter of law.

Here, the Court had before it claims that these acts constituted contributory negligence and claims that the facts constituted assumption of risk. Both claims had received support in the lower courts. The Supreme Court could have held either: (1) the facts constituted contributory negligence, or (2) the facts constituted both assumption of risk and contributory negligence. Nevertheless, the Court found that these facts constituted assumption of risk even though the petitioner knew of the specific defect and persisted in using the claw bar when it would appear obvious that in so doing he was running the risk of injury.

How can one conclude that, if the aforesaid facts constitute assumption of risk, the case of petitioner herein, who knew generally of the defective condition of the roadbed but who had no specific knowledge of the hole in which he fell, does not come within the doctrine?

In the year 1939, the Congress of the United States passed an amendment to the Federal Employers' Lia-

bility Act, now known as Title 45 U.S.C.A., Section 54. The effect of this amendment was to provide that a railroad employee did not assume the risk of the negligence of the carrier or of his co-employees, and that the doctrine of assumption of risk as known and identified in the previous judicial decisions would not continue to exist as a defense available to a carrier. The amendment left unanswered the question as to whether the facts which previously constituted assumption of risk might as such be considered by a court or jury as contributory negligence. The Supreme Court of the United States in the case of *Tiller v. Atlantic Coast Line R. Co., supra*; answered this question in the negative. Mr. Justice Black speaking for the majority of the Court stated at page 612:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of (March 2, 1893, 45 U.S.C.A. § 1, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name'; and no such result can be permitted here."

In a concurring opinion, Mr. Justice Frankfurter stated at page 620:

> "The point is illustrated by two opinions of Mr. Justice Holmes. In Selflemmer v. Buffalo, R. & P. R. Co., 205 U.S. 1, 12, 13, 51 L. ed. 681, 686, 687, 27 S. Ct. 407, he called attention to the danger of relieving from liability for negligence by talking

about 'assumption of risk'—a danger resulting from the ambiguity of the phrase. 'Assumption of risk' by an employee may be a way of expressing the conclusion that he has been guilty of contributory negligence.

"But an employee cannot be charged with contributory negligence simply because he 'assumed the risk'; the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation? As Mr. Justice Holmes admonished us in the Schlemmer case, 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name.'

Justice Frankfurter specifically referred to and quoted from the decision of Justice Holmes in *Schlemmer v. Buffalo, R. & P. R. Co., supra.* While Mr. Justice Black did not so specifically identify that decision it is significant to note that he cited the Holmes decision in *Schlemmer v. Buffalo, R. & P. R. Co., supra,* as the authority for the above quotation. The majority opinion and the concurring opinion specifically cited and reaffirmed the words of Mr. Justice Holmes and make necessary a re-examination and appraisal of that case as it relates to the case at bar.

In *Schlemmer v. Buffalo, R. & P. R. Co., supra,* the Supreme Court of the United States reviewed a judgment of the Supreme Court of the State of Pennsylvania affirming a judgment of the Court of Common Pleas for Jefferson County, Pennsylvania, which granted a non-suit in an action for a death of a railroad employee. The Supreme Court found as facts that the decedent was injured while attempting to couple a shovel car to a caboose. In performing these acts, it was necessary for the decedent to get between

the cars and keep below the level of the bottom of the shovel car. He was aware of the danger to him and had been specifically ordered twice to keep his head down by the head conductor. Notwithstanding the knowledge he had and the warnings, in making the coupling the decedent rose a little too high and the top of his head was crushed resulting in his death. The trial court sustained a non-suit on the ground of the deceased's contributory negligence and the judgment was affirmed by the Supreme Court of Pennsylvania on that ground.

Thus, it will be observed that the Court had before it the precise question as to whether the doctrine of assumption of risk or the doctrine of contributory negligence was available, and whether the fact that the deceased had raised his head too high, contrary to the express orders of his superior, was such a fact as would take the case out from the doctrine of assumption of risk and into the doctrine of contributory negligence. Justice Holmes speaking for the Court, answered this question in the negative and reversed the Supreme Court of the State of Pennsylvania. The Court's reasoning and the distinction drawn between the assumption of risk and contributory negligence are so important as to warrant extensive quotation. Thus, Justice Holmes stated at page 686:

> "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same

ground. Choctaw, O. & G. R. Co. v. McDade, 191 U.S. 64, 68; 48 L. ed. 96, 100; 24 Sup. Ct. Rep. 24. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. Patterson v. Pittsburg & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound."

Finally, Justice Holmes stated at page 687:

"* * * We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any came later. *But suppose the non-suit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, be-*

cause it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position to direct a heavy drawbar moving above into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however, unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was so inevitably and clearly attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed."

"Judgment reversed."

Under this decision, it is necessary to conclude that contributory negligence may not be used as a basis for defense if predicated upon the facts which constitute assumption of risk. Indeed, one is compelled to go further and conclude that, even if the acts would usually be deemed to constitute negligence, such is not the case if they are clearly and inevitably attached to the risk involved. In other words, they cannot be considered other than as included within the doctrine of assumption of risk.

Schlemmer, knowing that raising his head too far would be dangerous and having received instructions

relative thereto was found not guilty of contributory negligence. It is submitted that the failure of this petitioner to take some unspecified acts to ascertain the possible existence of a possible hole whose location and accompanying danger he was not cognizant of, except in a remote and general way, can only be encompassed by the doctrine of assumption of risk. It is undisputed here that the petitioner knew that there were many holes and pockmarks in that general area. It is likewise undisputed that he had no knowledge of the existence of the hole which caused his fall. If these facts were held to constitute contributory negligence then there would be no meaning to the doctrine of assumption of risk, because the doctrine of contributory negligence would immediately become operative prior to the time of the act resulting in an injury. The intent of Congress in enacting Title 45 U.S.C.A., Section 54, would be entirely avoided and the railroads could safely contend that the accident was solely the fault of the employee because he had knowledge of the existence of the dangerous conditions. That is not the proper interpretation of the decisions heretofore mentioned, as illustrated by the case of *Thomas v. Union Railway Company*, 6th Cir., 216 F. 2d 18.

That case was decided in 1954, fifteen (15) years after the passage of the 1939 amendment. Upon leaving his office and stepping from the porch thereof onto the concrete floor of the round house, the plaintiff slipped and fell because of pin grease that had been left upon the concrete through the negligence of the railroad. The carrier did not at that time have available to it the doctrine of assumption of risk. However, it defended on the basis that the dangers to the plaintiff were obvious to him, and were as well known

to the plaintiff as they were to the defendant and therefore the carrier could not be held liable for injuries sustained. This in substance and effect is a sort of a last clear chance doctrine, since it argues that if the employee knew or should have known of the danger that existed and was hurt, the injury was solely due to the fault or negligence of the employee because he had the last opportunity to avoid his injury. The Circuit Court disposed of this argument in accordance with the views heretofore set forth, saying at page 19:

> "The trial court charged the jury that the railroad was not liable for injuries sustained from dangers that were obvious or as well known to the injured party as to the railroad; and that if the jury found from the evidence a dangerous condition of the concrete floor near the foreman's office, in the roundhouse, or deficient lighting facilities in that place, 'if such dangerous condition existed, was obvious, or as well known to the plaintiff Thomas as to the railroad, the defendant would not be liable for injury sustained from such dangerous condition.' The foregoing charged the employee with assumption of risk. This was error, as 'every vestige of the doctrine of assumption of risk was obliterated from the law (the Federal Employers' Liability Act) by the 1939 amendment.' Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58, 63 S. Ct. 444, 446, 87 L. ed. 610. Even though the employee may know that the employer has been negligent in the furnishing of a safe place to work, the employee does not, under the Federal Employers' Liability Act, assume the risks of such danger. Williams v. Atlantic Coast Line R. Co., 5th Cir., 190 F. 2d 744, 748."

Accordingly, the Circuit Court reversed the trial court's verdict and sent the case back for a new trial. Again let us point out that the 5th Circuit sent a case back for a new trial where a man stepped upon grease

which he knew to be in the area on the basis that these facts did not constitute negligence, but did in fact constitute assumption of risk. If that be true, can the appellant herein be penalized for stepping into a hole that he did not know existed?

The petitioner herein bases his case on the negligence of the respondent railroad. If every vestige of the doctrine of assumption of risk was obliterated by the 1939 amendment, then any defense based upon the petitioner's acts or omissions must likewise have been obliterated, because petitioner fell into a hidden hole (unlike Thomas who was charged with actual knowledge of the condition that caused his injury). The respondent railroad has never seriously contended in instructions or brief that in this case petitioner assumed risks not due to the fault or negligence of the carrier or its agents.

The Supreme Court of the State of Minnesota has adopted petitioner's theory as the correct statement of the law in *Jacobson* v. *Chicago N. W. R. Co.*, 22 N.W. (2) 455, wherein the Court stated at page 459:

> "In determining whether plaintiff was guilty of contributory negligence and whether, as defendant claims, his contributory negligence was the sole proximate cause of the accident, it is our plain duty to lay out of mind any question of whether he was guilty of assumption of risk, because that defense was entirely obliterated by the 1939 amendment of the act. Crawford v. D. M. & I. R. Ry. Co., 220 Minn. 225, 19 N.W. 2d 384. The defense of assumption of risk is not to be let in under the label of contributory negligence. Tiller v. Atlantic Coast Line R. Co., 318, U.S. 54, 63 S. Ct. 444, 88 L. ed. 610, 143 A.L.R., 967 supra. See, Maloney v. Cunard Steamship Co., Ltd., 217 N.Y. 278, 111 N.E. 835."

While not a railroad case, the Supreme Court of Minnesota had before it in *Schrader* v. *Kriesel*, 45 N.W. 2d 395 a problem involving almost identical facts to those herein. The owner of a used car lot was sued by a customer who sustained injuries while walking on the lot. The plaintiff testified that upon entering the lot she noticed its surface was rough. She admitted that she had previously been on it and that there had been ice and snow on it, but that it was not as bad as it was on the date of the injury. In walking in the lot, the plaintiff slipped in a rut and fell, breaking her leg. The rut appeared to have been made by a car wheel; however, plaintiff testified she didn't see the rut because it was covered with snow. The defendant contended that plaintiff had assumed the risk. There was no contention that any other defense doctrine was applicable. Indeed, the Supreme Court clearly distinguished between the elements of assumption of risk and ordinary negligence and held that the issues had been properly submitted to the jury on the doctrine of assumption of risk.

The petitioner does not wish to appear in the position of stating that it is impossible for there to be contributory negligence in a case at the same time that there is assumption of risk, because that likewise would be clear perversion of the words of Justice Holmes, Justice Black, and Justice Frankfurter. This distinction is clearly set forth in the case of *Murray* v. *the New York, New Haven and Hartford R. Co.*, 2nd Cir., 255 F. 2d 42.

On January 24, 1953, the plaintiff therein, a locomotive engineer, employed by the defendant, went to the defendant's shop to pick up an engine. Three engines had been assigned to this run and had been lined up upon a single track. The engineer discovered

that the first engine was defective and so notified the foreman of the hostlers to remove it. The plaintiff climbed aboard the lead engine. The hostler moved it forward so that the foreman could move the defective engine onto another track. When this was accomplished, the hostler began to move the first engine back to couple onto the third engine. The coupling was made with such severity that the plaintiff fell back against a partition and suffered the injuries which were the subject of that action.

Just before the defendant rested its case, it read into the record an operating rule of the defendant's the effect of which was to provide that it was contrary to the company's rule for the plaintiff to be riding on the engine under the circumstances existing at the time of injury. The violation of a company rule has always been a fact outside the doctrine of assumption of risk. See, *Owens* v. *U. P.*, 63 S. St. 1271, 319 U.S. 715, 87 L. ed. 1683. The violation of a rule does not constitute assumption of risk but is at most contributory negligence leading to a division of damages. *Cross* v. *Spokane & P. & S. R. Co.*, 157 Wash. 425, 291 P. 336. *Certiorari denied*, 1951, Supreme Court 345, 283 U.S. 821, 75 L. ed. 1436.

Therefore, the Second Circuit ruled that while the plaintiff could not be held negligent on the basis of the doctrine of assumption of risk, a jury could well consider whether plaintiff's violation of a company rule constituted negligence, and the amount, if any, that such negligence contributed to plaintiff's injury. Thus, the violation of the company rule was a fact outside the scope of the doctrine of assumption of risk and unrelated to such doctrine, and as a consequence, a jury was entitled to consider that fact in mitigation of damages.

It is submitted that the true rule is set forth in the case of *Allen v. The Southern Pacific Company, Texas*, 106 S.W. 441, page 446:

> "* * * If, in cases where the same facts which would make out the defense of assumed risk (were such defense not abolished) would also constitute the defense of contributory negligence, the latter defense should be allowed to prevail, the humane and beneficent purpose of Congress would in a large number of cases be rendered abortive. Therefore, as a statute should be so construed as to accomplish its evident intention and purpose, we are of the opinion that the act, in abolishing the defense of assumed risk, did away with any other defense, though of a different name, which would be constituted by identically the same facts which go to establish that of assumed risk."

It is submitted, therefore, that it was error on the part of the trial court to submit the question of contributory negligence to the jury on the basis of the facts adduced at this trial, that it was error on the part of the Supreme Court of the State of Utah to affirm said decision, and that the petitioner is entitled as a matter of law either to the restoration of the $10,000.00 deducted for contributory negligence, or to a new trial.

WHEREFORE petitioner prays that a writ of certiorari issue to review said judgment.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 8957

THOMAS P. SPRUNT, *Plaintiff & Appellant,*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Defendant & Respondent.*

WADE, *Justice:*

Thomas P. Sprunt, plaintiff and appellant herein, while performing his duties as a switchman for the Denver & Rio Grande Western Railroad Company, respondent herein, fell on some snow-covered rough ground in the yard of the Vitro Chemical Company in Salt Lake County and injured his shoulder. A jury awarded him a gross judgment of $15,000, but reduced the same two-thirds for his contributory negligence as allowed under the federal Employers' Liability Act, resulting in a net judgment of $5,000. He appeals, attacking the finding of contributory negligence and the inadequacy of the damages.

Appellant contends that there was no evidence introduced showing that he had not acted as a reasonably prudent person in the same circumstances would have acted and the jury should have been instructed he was not guilty of contributory negligence and therefore the court erred in submitting the question of contributory negligence to the jury.

If the evidence will reasonably support a finding of contributory negligence, then the court did not err in submitting that issue to the jury.[1]

[1] Rogalski v. Phillips Pet. Co., 3 Utah 2d 203, 282 P. 2d 304; Cooper v. Evans, 1 Utah 2d 68, 262 P. 2d 278 and Stickle v. U. P. RR. Co., 122 Utah 477, 251 P. 2d 867.

The evidence disclosed that at the time of the accident appellant was the foreman of respondent's switching crew working in the yards of the Vitro Chemical Company. The terrain adjacent to the tracks where the switching crews worked was rough and pockmarked with holes caused by a clam shell machine. This machine was used to pick up ore dumped from the cars by the side of the tracks and redeposited in stockpiles further removed from the tracks. Appellant had been employed by defendant as a switchman for over 25 years and had been acquainted for at least six months with the existing condition in the yard of the Vitro Chemical Company. On the day that appellant was injured the holes were covered with snow which had fallen during the night. Appellant was in the process of checking cars and as he was walking along taking their numbers the cars began to move, going about two or three miles per hour. In attempting to board one of the moving cars in his customary manner he got a hold with left hand but missed with his right hand because he had stepped into a hole and slipped causing him to lose his balance and fall.

Appellant argues that the evidence proves the accident was caused by the failure of the respondent to provide him with a safe place to work and the fact that he had knowledge of the hazardous conditions under which he was compelled to work would be important if the defense of assumption of risk were available to respondent. But the same fact should not be a basis for a finding of contributory negligence, and therefore there is no basis upon which it could reasonably be found that appellant was negligent.

The court properly instructed the jury that the Federal Employers' Liability Act made unavailable to the respondent the defense of assumption of risk by an employee who suffers an injury "because of any defect due to its negligence in its appliances, roadbed or equipment. . . ." Appellant's contention that his knowledge of a hazardous

condition cannot be the basis for a finding of negligence is not sound. We must assume that the jury followed the instructions of the court, and that it did not find appellant negligent because he had assumed the risks of his employment. It would not be unreasonable to conclude that a reasonably prudent person, with knowledge of the fact that the snow covered holes where he was working, should take the precaution to ascertain whether he was standing on or near sufficiently firm ground to safely make the swing onto the moving cars and that the failure to do so was a proximate cause of the injury. The fact that if the defense of assumption of risk had been available to respondent, appellant's knowledge of the hazardous conditions would have been pertinent, does not make such knowledge unavailable as a basis for a finding of negligence if it could be reasonably found that a prudent person with such knowledge would not have attempted to board the cars without first ascertaining whether he was standing at or near sufficiently firm ground to proceed safely. The court therefore did not err in submitting the question of contributory negligence to the jury.

There is also no merit to appellant's contention that the damages awarded were so inadequate as to show that the jury had failed to follow the court's instructions because from the evidence introduced as to his life expectancy and the difference in the amounts he had been earning before and after the accident, the jury should have found his damages were almost double that which were actually awarded him. Although the evidence introduced could have justified a larger verdict than granted, the evidence of the actual damage suffered by appellant was not so certain that the amount granted is so inadequate as to make it appear that it was given under the influence of passion or prejudice or that in the interest of justice it should be set aside. The jury was not bound to believe that appellant would live a definite number of years even though the mortality table showed the average life ex-

pectancy of a person his age, nor were they bound to believe that appellant's earnings would have remained the same after the accident if he had not been incapacitated by his injuries, nor that his earning capacity was reduced as much as he claimed. The evidence submitted was merely a guide to aid in arriving at an award. Under such a state of facts we do not interfere with the judgment of the jury. Bodon v. Suhrmann, 327 P.2d 826, 8 Utah 2d 42, cited by appellant has not changed the reasons upon which this court will change an award of damages by a jury. The jury in this case awarded $15,000. This is a substantial amount and this court cannot say that justice demands a different result.

Affirmed. Costs to respondent.

WE CONCUR:

J. ALLAN CROCKETT, *Chief Justice*
F. HENRI HENRIOD, *Justice*
ROGER J. McDONOUGH, *Justice*
JOHN F. WAHLQUIST, *District Judge*

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

June 26, 1959

Office of the Clerk

C. C. Patterson, Esq.
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427 - 27th Street
Ogden, Utah

No. 8957

THOMAS P. SPRUNT

v.

THE DENVER & RIO GRANDE WESTERN

This day Petition for Rehearing denied. Case remitted to Salt Lake County.

L. M. CUMMINGS, *Clerk*

STATUTES

45 USCA § 51. LIABILITY OF COMMON CARRIERS BY RAILROAD; IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her per-

sonal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

45 USCA § 53. CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

45 USCA § 54. Assumption of Risks of Employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

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JAMES R. BROWNING, Clerk

IN THE SUPREME COURT
of the
UNITED STATES
October Term, 1959

THOMAS P. SPRUNT,
Petitioner,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,
Respondent.

No. 424

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
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BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case in his brief is too skeletal to give the court an adequate picture of the facts. This statement is made to outline the essential evidence more fully.

During the daylight hours of January 4, 1957, the plaintiff, a 58 year old switchman, employed by the defend-

ant company, was injured when he attempted to board an ore car which had just started to move and which was travelling two or three miles per hour. (R. 41). The plaintiff was part of a switch crew which was moving cars loaded with uranium ore into private yards and moving the empties out (R. 13, R. 24). The process involved bringing in a string of loaded cars, which were unloaded by means of opening dump doors on the sides of the cars, allowing the ore to fall out beside the track (R. 17). The ore was then picked up by a clam shell machine (a diesel machine with a two yard bucket) (R. 18), and deposited in stock piles farther away from the track. Then a bulldozer would proceed along the area to attempt to remove ore that had fallen between the rails and to clean and smooth up the area adjacent to the tracks (R. 28).

Two or three cuts or groups of cars were delivered each day (R. 26) so that 12 to 18 cars a day were unloaded (R. 25, 56). The switching and unloading was a continuous process throughout the day (R. 137). According to the plaintiff the operation of the clam-shell in picking up the ore took bites out of the ground in the area adjacent to the track, which created the existence of numerous holes 8 to 12 inches deep (R. 43). The witness Patterson, another member of the crew, claimed that the bulldozer did not necessarily remove all the holes in the process of its smoothing operation. (R. 19). This operation, according to plaintiff and his witness, created a rough area over which the plaintiff and other switchmen had to walk. Patterson testified that the holes were "Maybe three feet, maybe five feet" apart (R. 23).

Plaintiff testified as follows on page 53:

"Q. Even though the track was cleaned up and it

was cleaned up as slick as a bowling alley, when another string of cars would come it would clutter up the situation?

"A. Yes.

"Q. In other words, if you clean up as I say, clean as a bowling alley, you would have to do it two or three times a day?

"A. Yes."

At the time of the accident there was a "light skiff of snow" on the ground (R. 31). The plaintiff attempted to board one of the moving cars by taking hold of a grab iron on the side of the car with his left hand, putting his foot in a stirrup and swinging himself up onto the car. He claimed his foot slipped or he stepped into a hole, fell and injured his left shoulder (R. 41-42).

Exactly what happened or what he did at the time of the accident is not clear in the plaintiff's mind for he describes it differently in different places in the record.

"Q. (By Mr. Patterson) Now, what happened when you--describe how you started to mount the car, what you did?

"A. Well, as a general rule when you are switching on a lead, or anything, we most generally hit the stirrup with our right foot and most generally reach up with the one hand, get hold of the grab iron and follow up with the other, when I went to follow up I slipped in the meantime, and I couldn't get the grab iron.

"Q. Why did you slip?

"A. I stepped in a hole.

"Q. Will you describe that hole to the jury, please?

"A. Well, as far as I remember, it was a hole along

side the cars where we walked, made by the clam shovel cleaning up the ore.

"Q. Describe the hole itself as much as you can?

"A. I would say the hole was around between eight and twelve inches deep." (R. 42-43)

Later on cross examination the plaintiff said:

"Q. Mr. Sprunt, as I understand you reached up with your left hand to board the car going about two or three miles an hour, is that right?

"A. Yes sir.

"Q. When you got your hand on that particular bar, how high would that be?

"A. I would say about even with my face.

"Q. In these dump cars they are kind of low?

"A. Well, yes, your ladder on cars is a standard gauge.

"Q. The grab iron you were going to reach from the ground would be about that high?

"A. Yes.

"Q. You reached with your left hand?

"A. Yes sir.

"Q. When you reached with your left hand, did you put any weight on there for the purpose of boarding the car?

"A. Well, no, not exactly.

"Q. Mr. Sprunt, I am not trying to get you in detailing the matter to relate what each muscle did in this particular time. When you reached up, what was the usual way to do it, put the weight on one hand?

"A. Most generally put the weight on both hands.

"Q. You reached with the left hand, and hadn't got your weight up?

"A. No sir.

"Q. You were walking when this occurred?

"A. No.

"Q. You were standing still?

"A. Yes.

"Q. So you were standing still when the car came past going about two or three miles an hour and you reached up with your left hand?

"A. Yes sir, that is right.

"Q. Were you standing in a hole?

"A. No I wasn't.

"Q. Did you move your feet before you got aboard?

"A. That is something I can't say.

"Q. As you reached with your left hand, as you started to board, your foot went in a hole?

"A. No, generally when you are boarding a car you swing yourself on, when I went to swing on I slipped." (R. 58-59)

The plaintiff's left hand lost its grip on the grab iron and he fell to the ground (R. 60).

On page 43 of the record, the plaintiff says:
". . , it was done so quick I don't know how I fell."

SUMMARY OF ARGUMENT

The questions presented by the plaintiff's counsel in his brief are simply not pertinent to the cause at all. The only question is: *Was the trial court justified in submitting the issue of plaintiff's contributory negligence to the jury?* Assumption of risk has nothing to do with this case. It is admitted by plaintiff's counsel that the jury was specifically and clearly instructed that assumption of risk was not a defense. The issue of contributory negligence was submitted under proper instructions. Injecting the issue

of assumption of risk into this case is simply setting up a straw man and then trying to knock it down.

Defendant contends that the evidence required the court to submit the issue of plaintiff's contributory negligence to the jury; that it was properly submitted and the jury decided that the plaintiff was contributorily negligent and rendered its verdict with appropriate diminution thereof for the plaintiff's contributory negligence.

Inasmuch as the jury was properly allowed to perform its historic function, and it would have been an error to deny the jury that right, the Writ of Certiorari should be denied.

ARGUMENT

Defendant denies that its case is in any way founded or dependent upon the doctrine of assumption of risk. Defendant agrees with plaintiff that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment to the Federal Employers Liability Act (*Tiller vs. Atlantic Coast Line Railroad Company*, 318 U. S. 54, 87 L. ed 610). As admitted by plaintiff in his brief to the Utah Supreme Court, (P. 23), the Court "instructed the jury that assumption of risk was not a defense and that the burden of proving contributory negligence was on the defendant."

Defendant relies, as will be demonstrated hereinafter, on specific acts of negligence on the part of plaintiff to sustain its position that the plaintiff was contributorily negligent and that the court properly submitted that issue to the jury.

Following are the acts of the plaintiff, appearing in

the record, which reasonable jurors could conclude would be negligent:

1. Jurors might reasonably have believed that the plaintiff could and in the exercise of reasonable care should have selected a safer place to board the car because:

(a) Plaintiff knew there were gouge marks left by the clam shell which could constitute a hazard unless he watched his footing carefully;

(b) There is evidence there was only a "light skiff of snow" on the ground (R. 31);

(c) Plaintiff claimed the gouge mark involved was eight to twelve inches deep (R. 43);

(d) The gouge marks were three to five feet apart (R. 23).

Members of the jury could reasonably have concluded that a hole eight to twelve inches deep could and should have been seen by the plaintiff if there was only a light skiff of snow on it; and inasmuch as there were areas three to five feet wide without holes or gouge marks, he had ample opportunity to stand in areas of safety to board the car and did not have to stand on the edge of a hole.

2. The plaintiff admitted in his testimony that it was customary to take hold of a grab iron with both hands and distribute the task of pulling oneself up onto the car between both hands. On page 58 of the Record, plaintiff was asked by counsel, "When you reached up, what was the usual way to do it, put the weight on one hand?" and the plaintiff answered, "Most generally put the weight on both hands." Members of the jury may reasonably have concluded that the plaintiff was negligent in this instance in

grabbing with one hand and imposing all of the initial strain on that one arm, his left, rather than using both arms, especially when the plaintiff was conscious of the fact that his left shoulder was weak from previous dislocations. (R. 60, 75, 77)

3. The members of the jury may reasonably have believed that the plaintiff carelessly got a foot in the stirrup before he took a firm grip—or any grip at all with his hand—and as a result lost his balance and slipped and fell.

4. The jury may reasonably have concluded it was negligent for plaintiff to attempt to board the car from an area of rough footing when he could have walked alongside the car and performed his duties. Mr. Sprunt claimed that he had to board the car so that he could give signals to the engineer. However, the jury may not have believed that in light of the fact that Mr. Patterson, the other switchman, testified that he, Patterson, was riding the head end car of the seven or eight car cut (R. 20), that is, the car farthest from the engine (the cars were being backed toward the hopper) and he, Patterson, gave the signal to the engineer to make the backward movement and to stop the movement when he saw the plaintiff lying on the ground. Therefore, according to Patterson's testimony he, Patterson, was where the engineer could see him and he being on the lead car would be the man to give the signal when to stop the cut in the vicinity of the hopper. In other words, in spite of the plaintiff's statement, it does not appear from the Record that the plaintiff would have been the man to give the signal, for he would have been riding on the east side of a car about halfway between the end of the cut and the engine. He would have been in no position to know when the stop signal should be given to the engineer to stop the

cut when the cars were properly lined up for the hopper (R. 20).

5. The plaintiff states in one place in the record that he was standing still when he attempted to board the car. In another place he says he stepped in a hole. With this conflict in his account of the incident, members of the jury could reasonably have concluded that he was walking immediately before he attempted to board or that at least he took one step before or as he attempted to board and that he simply didn't observe with due care where he was stepping and that the careless step resulted in the slip and fall.

6. Members of the jury might have reasonably concluded that the alleged hole had nothing to do with the fall; that the plaintiff didn't slip or step into a hole, because on page 59 of the record, plaintiff testified as follows:

> "Q. As you reached with your left hand, as you started to board, your foot went in a hole?
>
> "A. No, generally when you are boarding a car you swing yourself on, when I went to swing on I slipped."

Earlier on page 43 of the record, the plaintiff said: ". . . it was done so quick I don't know how I fell."

Consequently members of the jury could reasonably have concluded that the cause of this accident was that the plaintiff did not step with due care on the slippery snow on the ground and because of his lack of care simply slipped on the snow and the hole had nothing to do with it.

The six items above are all examples of conduct on the part of the plaintiff documented in the record which the jury could reasonably consider negligence. None of them have anything to do with assumption of risk. None

of them are dependent on or related to the assumption of risk doctrine.

In light of the above decisions that might have been made by reasonable men acting on a jury, let us take a look at the law applicable.

In the FELA case of *Wilkerson vs. McCarthy*, 336 U.S. 53, 93 L. ed. 497, a case arising out of Utah, Justice Douglas in his concurring opinion, reviewed all of the FELA cases decided by the court for the preceding ten years and made this statement:

> *"The criterion covering the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected."*

In this case the jury function in passing on the disputed question of fact, that is, whether or not the plaintiff was contributorily negligent, was respected and, therefore, certiorari should be denied.

In the case of *Everett vs. Southern Pacific Company*, 181 Fed. 2d 58, 9th Circuit 1950, an FELA case, one of the issues involved was the contributory negligence of the plaintiff. On page 61 the Court said:

> "A jury's verdict is entitled to the same respect regardless of whether it be returned for plaintiff or for defendant, whether for employee or employer."

In *Henwood vs. Coburn*, 165 Fed. 2d 418, CCA 8th Circuit 1948, the Court said:

> "As we have pointed out, under the teaching of the recent decisions of the Supreme Court, the domain of the jury in circumstantial cases under the Federal Employers Liability Act may not be nar-

> rowly bounded, and the settling of any question of negligence or proximate cause, where more than one rational possibility is involved on the evidentiary facts, is exclusively within its field. This is true for every purpose in the case, and, in according the jury its inherent function, recognition of the right in one aspect or incident of a case is as important as in another."

In a case on which plaintiff relies heavily in his brief, that of *Tiller vs. Atlantic Coast Line Railroad Company*, 318 U. S. 54 (1943) the court clearly supports defendant's contention in this case that the issue of contributory negligence should be submitted to the jury whenever there are any disputed questions of fact. Inasmuch as The Tiller case is so important, a statement of the facts would not be inappropriate. In the court's words, the facts were as follows:

> "... Tiller (the plaintiff) was standing between two tracks in the respondent's switch yards, tracks which allowed him three feet, seven and one-half inches of standing space when trains were moving on both sides. The night was dark and the yard was unlighted. Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track. The rear of the train which killed Tiller was unlighted although a brakeman with a lantern was riding on the back step on the side away from Tiller. The bell was ringing on the engine but both trains were moving. The Circuit Court found that it was 'probable that Tiller did not hear cars approaching' from behind him. No special signal of warning was given."

After eloquently disposing of the defense of assumption of risk, the court (Justice Black) said:

> "No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this court said of the problems of negligence 'we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it shouldn't decide such questions as these as well as others.' Jones vs. Tennessee, V. & GR Company, 128 U. S. 443, 445, 32 Lawyers Edition 478, 479. Or as we have put it on another occasion, 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury.
>
> "We think that the question of negligence on the part of the railroad *and on the part of the employee* should have been submitted to the jury."

Referring again to the case of *Wilkerson vs. McCarthy* Supra, the Court restated the principle on which the defendant relies in these words:

> "This court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury, if evidence might justify a finding either way on those issues."

Then the Court cites several of its own opinions to support this principle:

Lavender vs. Kurn, 327 U. S. 645, 90 L. ed 916, 66 S. Ct. 740.

Bailey vs. Central Vermont Railway Company, 319 U. S. 350, 87 L. ed 1444, 63 S. Ct. 1062.

Tiller vs. Atlantic Coast Line Railroad Company, supra.

Brady vs. Southern Railway Company, 320 U. S. 476, 88 L. ed 239, 64 S. Ct. 232.

If plaintiffs in FELA cases could successfully claim that most acts of carelessness on their part proximately contributing to their injury, did not constitute negligence but were part of a broad package of assumption of risk, then the comparative negligence principle of the Federal Employers Liability Act would be substantially destroyed and the employer would become an insurer. This fact is recognized in a case cited in the plaintiff's brief, *Murray vs. New York, New Haven and Hartford Railway Company*, 253 Fed. 2d 42, U.S.C.A. 2d, decided in 1958. While the plaintiff's counsel in his brief referred frequently to that case, he avoided quoting this significant principle enunciated by Judge Waterman on page 44 of his opinion.

> "The defendant may not be denied its partial defense of contributory negligence merely because the same evidence would be pertinent to prove assumption of risk."

In upholding the jury verdict in this case, the Utah Supreme Court relied on several of its previous decisions which are consistent with the rule that has been laid down by this Honorable Court, as demonstrated above. In the case of *Bennett vs. Denver and Rio Grande Western Railroad Company*, 117 Utah 57, 213 Pac. 2d 325, a FELA case, a jury awarded the plaintiff brakeman damages in the amount of $70,000.00 and thereafter diminished the amount by $20,000.00 upon finding the plaintiff's negligence contributed to his own injury. The defendant appealed and the plaintiff cross-appealed. The basis of plaintiff's cross-appeal, as in the case at bar, was that the issue of contributory negligence should not have been submitted to the jury. It was his contention that the court should have found that he was not negligent as a matter of law.

The Utah Court quoted from *Lavender vs. Kurn* supra as follows:

> ". . . Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear, but where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusions. And the Appelate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The Utah Court referred to the above quotation, then said:

> "The same rule should be applied against the employee and if from the evidence in this case the jury could fairly infer that the respondent did not use due care in his movements on top of the car, then we are not at liberty to set aside its findings."

In the case of *Rogalski vs. Phillips Petroleum Company*, 282 P. 2d 304 (1955 Utah) which was a master and servant case, the Court said:

> "It has been frequently announced by this court that contributory negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. Shafer v. Keeley Ice Cream Co., 65 Utah 46, 234 P. 300, 38 A.L.R. 1523; Lowe v. Salt Lake City, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708, Baker v. Decker, 117 Utah 15, 212 P. 2d 679. As was said in Linden v. Anchor Min. Co., 20 Utah 134, 58 P. 355, 358:
>
> "Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty

> arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

In the Utah case of *Cooper vs. Evans*, 262 P. 2d 278 (Utah 1953), the principle of law is put in sharp focus by the fact that in that case the plaintiff claimed, as in this one, that the Court should have found her free of contributory negligence as a matter of law. This case is particularly helpful because some of the facts are strikingly analagous to facts involved in the case at bar.

The plaintiff received injuries in a fall over a portion of a merchandise platform owned by the defendants which jutted out into a walk-way in the defendant's store. The trial court entered judgment for the defendants and the plaintiff appealed. In the trial court the jury had submitted an interrogatory for the jury to answer, asking whether plaintiff's failure to *observe and see* the platform amounted to contributory negligence. The jury answered the question in the affirmative and based on the jury's finding of contributory negligence, the court entered judgment for the defendants.

The court, in the case at bar, might very well have submitted a similar interrogatory to the jury, asking whether or not they believed plaintiff's failure to *observe and see* the hole in which he claimed he stepped, constituted contributory negligence.

In the Cooper case, the court said:

> "It is to be noted that although the word 'observe' as used in the interrogatory could be given a meaning equivalent to 'make observation for,' the more usual understanding is to regard the words 'observe' and 'see' as synonymous. Under such meaning, in telling the jury that Mrs. Cooper failed

to 'observe and see,' the court was only stating to them that uncontroverted fact, for Mrs. Cooper concedes that she did not see the obstruction. The court was aware that under the circumstances disclosed by the evidence, the conduct of Mrs. Cooper in failing to see the platform might, or might not, meet the standard of care required of her, and that the application of such standard is peculiarly within the province of the jury.

"Plaintiff is in error in her contention that the question of the existence of contributory negligence, under the situation which we here consider, is one of law. Contributory negligence would only be a question of law where the evidence showed, with such certainty that reasonable minds could not differ thereon, that the conduct in question either met or failed to meet the standard of due care. But where there is uncertainty as to whether such standard has been met so that reasonable minds could differ upon it, the question of whether such negligence exists is not a matter of law, but is one for the jury to determine."

CONCLUSION

Defendant is willing to stand on the language of the Utah court in its opinion in this case, 340 Pac. 2d 85:

"The court properly instructed the jury that the Federal Employers' Liability Act made unavailable to the respondent the defense of assumption of risk by an employee who suffers an injury 'because of any defect due to its negligence in its appliances, roadbed or equipment . . .' Appellant's contention that his knowledge of a hazardous condition cannot be the basis for a finding of negligence is not sound. We must assume that the jury followed the instructions of the court, and that it did not find appellant

negligent because he had assumed the risks of his employment. It would not be unreasonable to conclude that a reasonably prudent person, with knowledge of the fact that the snow covered holes where he was working should take the precaution to ascertain whether he was standing on or near sufficiently firm ground to safely make the swing onto the moving cars and that the failure to do so was a proximate cause of the injury. The fact that if the defense of assumption of risk had been available to respondent, appellant's knowledge of the hazardous condition would have been pertinent, does not make such knowledge unavailable as a basis for a finding of negligence if it could be reasonably found that a prudent person with such knowledge would not have attempted to board the cars without first ascertaining whether he was standing at or near sufficiently firm ground to proceed safely. The court therefore did not err in submitting the question of contributory negligence to the jury."

Defendant respectfully submits that the Petition for the writ should be denied.

Respectfully submitted,

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